Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-878

WARREN DALE KEEFER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

1

The judgment of conviction imposed upon Petitioner by the Superior Court of the State of California for the County of Santa Barbara was affirmed in a Mimeo Opinion of the California Court of Appeal, Second Appellate District, Division Three. The Opinion of the Court of Appeal is voluminous and, accordingly, is separately

presented.

2

Judgement of conviction was imposed by the Santa Barbara County Superior Court on November 3, 1975. The Court of Appeal affirmed the judgment of conviction on August 24, 1977, and denied a Petition for Rehearing on September 22, 1977. The California Supreme Court denied a hearing on November 17, 1977. The Court of Appeal issued its Remittitur on November 30, 1977.

3

Jurisdiction over this case is conferred on this Court by 28 U.S.C. §1257(3). Petitioner's conviction was affirmed by the highest Court of the State of California required to hear Petitioner's appeal, and the Supreme Court of the State of California, which had discretionary power to hear Petitioner's appeal, refused to

grant a hearing.

SUMMARY OF CHARGES ON WHICH
PETITIONER WAS CONVICTED

4

Petitioner was convicted of four counts of Grant Theft by False Pretenses in violation of California Penal Code §§ 484 (Theft defined) and 487.1 (Grand theft defined). Two of the counts (Counts I and II) were based upon statements allegedly made by Petitioner to lending institutions while acting as agent for purchasers in real property transactions, to facilitate loans sought by said purchasers. The remaining counts (Counts V and VI) were based upon statements allegedly made by Petitioner, acting as agent for parties involved in real property transactions, to facilitate the sale of trust deeds.

QUESTION PRESENTED

I

Five days prior to trial, without notice to Petitioner, Petitioner's "own recognizance" release status was revoked and bail of $500,000.00 was imposed. Petitioner, unable to post bail, remained in custody during trial. The question presented by this Petition is whether said action constituted the imposition of excessive bail in violation of the Eighth Amendment and/or deprived Petitioner of effective representation by counsel in violation of the Sixth and Fourteenth Amendments.

PETITIONER'S CONTENTION WAS PROPERLY
RAISED IN THE STATE COURTS

5

The contention that revocation of Petitioner's "own recognizance" status and

imposition of excessive bail violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights was advanced during trial pursuant to a motion for reduction of bail [C.T.715-721], on appeal [App. Op. Br.75-79; App. Rep. Br.28-30; Pet. Rehearing 14-15], and in a Petition for Hearing denied by the California Supreme Court. [Pet. Hearing 40-45]

The Court of Appeal held that Petitioner had "not shown that the mere fact he was in custody during trial adversely affected the outcome of the case." [Mimeo Op.95]

ARGUMENT

I

REVOCATION OF PETITIONER'S "OWN RECOGNIZANCE" STATUS AND THE SETTING OF EXCESSIVE BAIL, WITHOUT NOTICE, IMMEDIATELY PRIOR TO TRIAL, CONTRAVENED FUNDAMENTAL RIGHTS ACCORDED TO PETITIONER BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

The indictment herein was filed on June 26, 1975. Petitioner was arraigned on June 27, 1975, and was released on his own recognizance pending a hearing on his application to be released on his own recognizance. [C.T.9] On July 8, 1975, Petitioner's application to be released on his own recognizance was granted. [C.T. 569]

On October 1, 1975, the day on which a trial date was to be set, the People moved for an order revoking Petitioner's "own recognizance" status and setting bail pursuant to California Penal Code §1318.6.[1] [C.T.673-703] The People alleged that facts had come to the People's attention indicating that Petitioner had engaged in other criminal activities before and after his indictment "which facts

---

[1] California Penal Code §1318.6 provides that:

> "After a defendant has been released pursuant to this article [own recognizance], the court in which the charge is pending may, in its discretion, require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter. The court may order that the defendant be committed to actual custody unless he gives such bail or gives such other security."

represent a change in circumstances which substantially increase the risk of the said defendant's failure to appear and attend upon further proceedings in court in this matter." [C.T.673] The People's motion specifically alleged:

> "From the facts at hand, it appears that the defendant has fraudulently obtained, or has attempted to obtain by fraud, amounts of money ranging from $50,000 to in excess of $200,000 within the past few months, and that it may be his intention to flee this jurisdiction with whatever money he has obtained or may yet obtain before a judgment is rendered in the criminal charges now pending against him in this court."

[C.T.678 (Emphasis added)]

The Court granted said motion, fixed bail at $500,000.00, and remanded Petitioner to the custody of the Santa Barbara County Sheriff. Trial of the matter was set for October 6, 1975. [C.T.704]

On October 10, 1975, during the course of trial, Petitioner moved for a reduction in the amount of bail. [C.T.715-721] The declaration of Petitioner's trial counsel in support of said motion stated:

> "It is respectfully urged that bail should be substantially reduced for the following reasons:
>
> "1. Defendant voluntarily appeared at his arraignment and for booking by the County Sheriff.

> "2. Following his release on his own recognizance the defendant has made all required court appearances and additional court appearances not required of him by the court.
>
> "3. The defendant's prior record consists of only one misdemeanor conviction and would not suggest any motivation for the defendant to flee the Court's jurisdiction.
>
> "4. The defendant has cooperated throughout these proceedings with his counsel.
>
> "5. The defendant's present custodial status, particularly in a trial requiring close cooperation between the defendant and his counsel because of the number of documentary exhibits involved, makes

the preparation of the defendant's defense prejudicially difficult. Interview facilities at the County Jail where the defendant is incarcerated are very poor and prohibit the exchange of documents between the defendant and his counsel. Moreover, the conduct of the trial severely limits the time available to defendant to meet with his attorney in light of defendant's custodial status.

"6. The alleged crimes involved are not crimes of violence and do not suggest danger to any persons, should the defendant's bail be reduced and should he be able to make bail.

"7. The bail presently set is such as to totally preclude any

practical possibility of the defendant meeting the bail, defendant's finances being severely limited and he counting on help from his family to meet whatever bail may be set.

"8. The defendant has been the primary person caring for his elderly mother, having resided with her for some time, in order to care for her. Defendant's mother has been hospitalized during the last number of days and may still be hospitalized. Moreover, defendant's elderly father was hospitalized within the past several days for surgery, but in the course of such surgery suffered a stroke and as a result thereof is presently understood to be in intensive

care in the Los Robles Hospital, Thousand Oaks, California."

[C.T.718-719]

On October 13, 1975, the sixth day of Petitioner's trial, the Court heard argument by counsel on Petitioner's motion to reduce the amount of bail. [C.T.722; R.T.751-757] Petitioner's counsel noted that Petitioner resided in Westlake,[California] and that Petitioner had conducted business in the area for many years. [R.T.752] Counsel then reiterated the effect of Petitioner's custodial status upon preparation of Petitioner's defense:

". . .[A]s your Honor can readily see from what has gone on before us now in approximately a week of trial, this is an extremely complicated matter. It involved four counts, and I don't know

how many transactions for each count. I can assure the Court that it's very, very difficult, without considerable help from one's client, to put these transactions together. I can see that that would not be a reason for releasing a defendant where there are substantial reasons suggesting a risk or danger or what have you; but it seems to me that where the risk or danger of the defendant fleeing is as minimal as I see it to be here, the Court should consider the right of the defendant to be afforded every opportunity for the most expansive contact with his counsel." [R.T.754]

Petitioner's motion for reduction of bail was denied. [C.T.22; R.T.757] Petitioner was remanded to custody in lieu of bail, and Petitioner's counsel did not thereafter confer with Petitioner at the County jail. [R.T.2557]

On December 16, 1975, Petitioner's application for probation was denied and Petitioner was sentenced to state prison on each of the four counts, the sentences to run concurrently. [C.T.927] On the same day Petitioner filed Notice of Appeal [C.T.932] and moved for an order setting bail on appeal. The trial court declined to rule on said motion, but granted Petitioner's request for a stay of execution of the sentences to December 29, 1975 to permit counsel to file appropriate written motions. [R.T.2579-2580]

On December 31, 1975, Petitioner filed

a Petition for Writ of Habeas Corpus dated December 29, 1975, in the California Court of Appeal, Second Appellate District. [2d Crim. No. 28000] Said Petition was denied on January 7, 1976 without prejudice to Petitioner's right to apply to the trial court for an order granting bail on appeal. Petitioner so moved the trial court and on January 28, 1976, the Superior Court set bail on appeal in the amount of $250,000.00.

On or about February 12, 1976, Petitioner filed a second Petition for Writ of Habeas Corpus in the California Court of Appeal, Second Appellate District. [2d Crim. No. 28159] On February 20, 1976, the Court of Appeal set Petitioner's bail on appeal at $50,000.00. Petitioner was thereafter released on the bail set by the Court of Appeal pending resolution of his appeal.

The Eighth Amendment to the United States Constitution provides the "[e]xcessive bail shall not be required." Pursuant to the Due Process Clause of the Fourteenth Amendment, United States Constitution, the States, as well as the federal government, are prohibited from subjecting criminal defendants to excessive bail. Henderson v. Dutton (5th Cir. 1968) 397 F.2d 375, 377 fn. 3; Mastrian v. Hedman (8th Cir. 1964) 326 F. 2d 708, 711, cert. denied, 376 U.S. 965; Pilkinton v. Circuit Court (8th Cir. 1963) 324 F. 2d 45, 46: see Robinson v. California (1962) 370 U.S. 660, 666; Stack v. Boyle (1951) 342 U.S. 1; White v. Wilson (9th Cir. 1968) 399 F. 2d 596, 598.

Although the question of whether the Eighth Amendment impliedly guarantees a right to bail has not been definitively

resolved,[2] it is clear that where a statutory right to bail exists, bail in an amount greater than that necessary to assure appearance is excessive. Stack v. Boyle (1951) 342 U.S. 1, 5; Carlson v. Landon (1952) 342 U.S. 524,544-546.

Article 1, Section 12 of the California Constitution provides that "[e]xcessive bail may not be required," and provides, inter alia, an absolute right to bail "except for capital crimes." California Penal Code Section 1271 implements the foregoing Constitutional imperative by providing that "[i]f the charge is for any [offense other than a capital offense], he may be admitted to

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[2] See Carlson v. Landon (1952) 342, U.S. 524,; United States v. Motlow (7th Cir. 1926) 10 F. 2d 657; Trimble v. Stone (D.D.C. 1960) 187 F. Supp. 483, 484; Note Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1494.

bail before conviction, as a matter of right."

Where a California criminal defendant has been released on his own recognizance (see California Penal Code Section 1318),

> ". . . the court in which the charge is pending may require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter upon a finding, made in open court that the defendant has failed to appear or has violated any condition of the order releasing him on his own recognizance, or that there has been a change of circumstances which increases the risk of failure to appear, or that additional facts have been presented which were not shown at the time of the original order releasing the defendant on his own recognizance. The court may order that the defendant be committed to actual custody unless he give such bail or gives such other security." (P.C. §1318.6)

Applicable considerations in determining the amount of bail are: (1) The seriousness of the offense charged; (2) the previous criminal record of the

defendant, and (3) the probability of his appearing at trial. California Penal Code Section 1275. Although fixing the amount of bail rests with the discretion of the trial court, the exercise of that discretion must be overturned where the facts demonstrate that said discretion has been abused. Stack v. Boyle (1951) 342 U.S. 1, 6; see People v. Norman (1967) 252 Cal App. 2d 381.

Petitioner respectfully submits that the Superior Court set excessive bail so as to violate Petitioner's Constitutional right that excessive bail not be set and, moreover, so as to effectively deprive Petitioner of his Constitutional right to adequate representation of counsel. Bitter v. United States (1967) 389 U.S. 15; see People v. Brown (1960) 184 Cal. App. 2d 588.

In the instant case, Petitioner's prior criminal record clearly did not justify $500,000.00 bail. Petitioner's trial counsel represented that it consisted of one misdemeanor conviction [C.T. 718], and the People presented no contrary evidence.

Likewise, the extraordinary amount of bail was not justified by the seriousness of the charged offenses. Perusal of the facts set forth by the California Court of Appeal [Mim. Op. 3-60] demonstrates that although the charged offenses were felonies, they did not entail violence, but were rather highly technical crimes against property. Moreover, the seriousness of the offense charged is relevant only to the likelihood that a defendant will make required court appearances: "[t]he purpose of bail is not to punish

the defendant nor to protect the public safety, but to assure his presence in Court. . . People v. Gilliam (1974) 41 Cal. App. 3d 181, 191; see U.S. v. Leathers (D.C. Cir. 1969) 412 F. 2d 169; In re Underwood (1973) 9 Cal. 3d 345.

There remains only one possible proper justification for $500,000.00 bail - that it was required to assure Petitioner's presence at trial. Stack v. Boyle, supra; In re Underwood, supra. The People argued that because Petitioner allegedly was committing other crimes while released on his own recognizance, the risk that he would fail to appear at trial was substantially increased. [C.T. 673-674] Plainly, this is a non-sequitur.

The only arguable inference is that Petitioner was allegedly committing fraudulent acts in order to obtain money. It cannot reasonably be further inferred

that Petitioner would use any monies so obtained to flee the jurisdiction. Indeed, the opposite inference is equally likely: If Petitioner found that he could readily defraud persons in California, there would be no reason for him to go elsewhere. It is also equally likely that Petitioner would utilize any monies so obtained to pay his and his family's living expenses and/or his undoubtedly substantial attorneys fees. As was said in Savarese v. State Farm Ins. Co. (1957) 150 Cal. App. 2d 518, 520:

> "Of course, the building of inference upon inference may often result in a progressive weakening of a logical sequence, and lead to an ultimate conclusion which is untenable on the basis of the facts proven. Where an ultimate inference is thus remote from the evidence, it should be rejected." See also, Witkin, California Evidence (2nd Ed.), pp. 1053-1054.

The extraordinary amount of the bail imposed - $500,000.00 - lends further support to Petitioner's position: There was simply no evidence that such an amount was necessary to dissuade Petitioner from leaving the jurisdiction. Even the People's obviously inflated estimate was only that Petitioner "[had] fraudulently obtained, or [had] attempted to obtain by fraud, amounts of money ranging from $50,000 to in excess of $200,000 . . . " [C.T. 678] A fortiori, the amount of bail necessary to dissuade Petitioner from leaving the jurisdiction would certainly have been no more than $200,000.00.

"It is also significant that, after conviction, when the probability of flight was presumably at its maximum "(United States v. Allison (9th Cir. 1969) 414 F. 2d 407, 414), the Superior Court set bail

on appeal in the amount of $250,000.00, and the Court of Appeal thereafter reduced the amount of bail on appeal to $50,000.00. [p. 16, supra] "There is nothing to indicate why this less drastic action would not have sufficed during trial. [Citiation omitted]" United States v. Allison, supra, 414 F. 2d at 414.

Moreover, the facts available to the Court demonstrated a likelihood that Petitioner would appear at trial. Petitioner had been arraigned on June 27, 1975, had been in court on several occasions thereafter, both when required to be and when not so required, and had hired an attorney, presumably paid him, and cooperated with him. [C.T. 718] By October 1, 1976, over three months had elapsed since the arraignment and it was a scant five days before trial was to commence. This

conduct surely does not suggest an intention not to appear at trial.

The conclusion is inescapable that the Court set bail at $500,000.00 in order to keep Petitioner in jail and prevent him from committing crimes such as those alleged at length by the People. [C.T. 673-703] Such purpose was not only incompatible with the theory that crimes should be deterred by the threat of subsequent punishment rather than by prior confinement, but was clearly violative of the Eighth Amendment. Stack v. Boyle (1951) 342 U.S. 1; In re Underwood (1973) 9 Cal. 3d 345.

An important purpose of the Bail Clause of the Eighth Amendment, and statutes enacted pursuant thereto, is that of permitting "the unhampered preparation of a defense, . . . "Stack v. Boyle (1951)

342 U.S. 1, 4. Detention prior to and/or during trial seriously impedes the ability of a defendant to prepare his case.[3] Thus, in Bitter v. United States (1967) 389 U.S. 15, the United States Supreme Court summarily reversed the judgment of conviction, holding that the order of the trial judge remanding the defendant to custody for the duration of his trial after defendant was tardy in returning to court "constituted an unwarranted burden upon defendant and his counsel in the conduct of the case." Bitter v. United States, supra, 389 U.S. at 17. The Court did not inquire whether prejudice resulted from the improper commitment order.

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[3]See U.S. ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 70-71; Note, a Study of the Administration of Bail in New York City, 106 U. Pa. L. Rev. 693, 725; Note, Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031, 1054-1058.

In the instant case, the record demonstrates that Petitioner's defense was severely prejudiced by the imposition of exorbitant bail. Cf. United States v. Stroud (9th Cir. 1973) 474 F. 2d 737, cert. denied 412 U.S. 930; United States v. Allison (9th Cir. 1969) 414 F. 2d 407. In this case involving scores of witnesses and hundreds of exhibits, close consultation between Petitioner and counsel was obviously essential. It was the expectation of Petitioner and his trial counsel, as would be the normal practice in a complex case, that they would meet each evening after trial to review the evidence and organize the defense. [R.T. 2455] When a mere five days before trial, without warning, this expectation was thwarted, the lines of communication between Petitioner and his attorney were severed.

[C.T. 719; R.T. 2456-2457] As a result, Petitioner was deprived of effective representation of counsel.

Incongruously, the Court of Appeal disposed of the foregoing contention in one sentence: "Appellant has not shown that the mere fact he was in custody during trial adversely affected the outcome of the case. (People v. Brown, 184 Cal. App. 2d 588, 596.)" [Mim. Op. 95]

Petitioner respectfully submits that the substantial constitutional issues advanced herein are deserving of consideration beyond that accorded by the Court of Appeal.

The case relied upon by the Court of Appeal, People v. Brown, supra, contains only two sentences on the subject and no discussion of the particular circumstances wherein Brown may have been prejudiced by

his incarceration awaiting trial. Moreover, Brown did not seek a bail reduction and the amount of his bail does not appear in the record. Furthermore, Brown involved a relatively simple marijuana case rather than the complex multi-exhibit litigation here. It is quite clear in the instant case that Petitioner was prejudiced. His trial attorney so stated under oath. [C.T. 719] Common sense compels the conclusion that prejudice occurred.

In addition, the Court's notion that Petitioner had to show that the excessive bail "adversely affected the outcome of the case" was faulty. People v. Brown, supra at 596. This is, once again, plainly a constitutional issue. Petitioner's right not to be the subject of excessive bail requirements is explicitly protected by both state and federal constitutions.

Therefore, Petitioner need not show "probable prejudice" he need only show "possible prejudice." See People v. Spencer (1967) 66 Cal. 2d 158.

Even more basically, this case demonstrates a flagrant abuse of the constitutional bail provisions. The Court's approach leaves Petitioner, and others similarly situated, without any effective remedy where this ancient constitutional right is abused. "Excessive bail may not be required" says our Constitution. Here excessive bail was obviously required. This Court should not sanction this constitutional abuse.

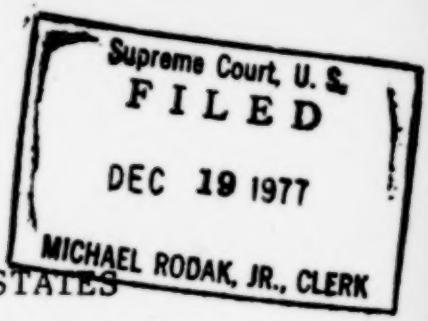
CONCLUSION

A Writ of Certiorari should be issued, directed to the California Court

of Appeal ordering it to vacate its Opinion and reverse the judgment of conviction.

Respectfully submitted,

RICHARD H. LEVIN
Attorney for Petitioner



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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

(Mimeo Opinion of Court of Appeal,

State of California)

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APPENDIX.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

People of the State of California, Plaintiff and Respondent, vs. Warren Dale Keefer, Defendant and Appellant.

2d Crim. 28493, LASC. A-108290.

Filed: Aug. 24, 1977.

APPEAL from judgment of the Superior Court of Santa Barbara County. Gilbert B. Perry, Judge. Affirmed.

Warren Dale Keefer, in Pro Per; Burton Marks, of Counsel.

Stanley M. Roden, District Attorney of Santa Barbara County; Gerald McC. Franklin, Deputy District Attorney, for Respondent.

By grand jury indictment Warren Dale Keefer was accused of four counts of grand

theft by false pretenses in violation of Penal Code Section 487.1. Following trial by jury he was found guilty as charged and sentenced to state prison. The sentences were ordered to run concurrently with an allowance being made of 77 days for time served in the county jail. He appeals from the judgment.[1]

Contentions

In an in pro per brief filed in association with counsel it is contended, in addition to claims of insufficiency of the evidence, evidentiary and instructional error, that (1) the appointment of "retired" judges to preside over pretrial and trial proceedings is violative of the state and federal Constitutions rendering the conviction void, (2) the grand jury

[1]We note the appeal is also taken from the order granting probation, however the record discloses that probation was in fact denied.

indictment was invalid, (3) prosecution under Penal Code section 487.1 was improper and (4) that defendant (a) did not receive and (b) was denied effective trial court representation in violation of his Constitutional rights.

We have examined each of these contentions and, for reasons to be stated, have determined that the judgment must be affirmed.

Discussion

Our function in reviewing a claim of insufficiency of evidence to support the conviction requires us to view the evidence in a light most favorable to the verdict, presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (People v. Henderson, 19 Cal. 3d 86, 97.)

Penal Code section 484 subdivision (a) defines theft as follows: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another. . . is guilty of theft." Grand theft is theft of property of a value exceeding $200. (Pen. Code § 487 subd. 1.)

> "To support a conviction of theft for obtaining property by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner was in fact defrauded. It is necessary to prove that the defendant benefited personally from the fraudulent acquisition. (People v. Jones, 36 Cal.2d 373, 377, 381 [224 P.2d 353].) The false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause. (People v. Chamberlain, 96 Cal. App.2d 178, 182 [214 P.2d 600] and cases there cited.)"

(People v. Ashley, 42 Cal.2d 246, 259, cert. denied 348 U.S. 900; see also

People v. Fujita, 43 Cal.App.3d 454, 467.)

With respect to count I (the Banning transaction) defendant is charged with obtaining some $19,500 from Redlands Federal Savings and Loan Association by means of false pretenses. It is argued that "[t]he only relevant representation made by appellant to the 'victim' Redlands is a letter dated December 1, 1970. . ." and that "[a] careful examination of this letter readily reveals that the representation in it is not false within the meaning of the statute." The background of the transaction in question is disclosed in the testimony of Randall Sabau, the brother-in-law of Clark Keefer, who is defendant Warran Keefer's brother.

Sabau, a meat cutter for Safeway Stores, Inc., and a reserve deputy

sheriff, formerly living and working for Safeway in Barstow, was transferred to Santa Barbara on February 16, 1970. With the assistance of defendant, a real estate agent employed by Lloyd Allbright Associates, Sabau purchased a home in Santa Barbara. Defendant prepared the loan application, escrow papers and had access to Sabau's financial records in closing the deal. Following the purchase of this home the following transpired:

"Q Sometime after the purchase of your house, did Mr. Keefer and yourself discuss an investment for certain types of property?

A Yes, sir.

Q What was the reason that you were interested in some kind of investment?

A As a tax shelter.

Q What did you understand, then, that a tax shelter would be and do for you?

A It would give me a tax break on my income taxes.

Q What was the reason that you believed you needed such a break?

A Because my wife and I started getting into a high income bracket and we were paying a lot of taxes.

Q Was this discussed with Mr. Keefer?

A Yes, sir.

Q Did he have any suggestions?

A Yes, sir.

Q What was that; what were they?

A He told me he had a piece of property that he could sell me for a tax shelter.

Q Did he indicate where that

property was located?

A Yes, sir: in Banning, California.

Q Do you recall approximately when this conversation occurred?

A Approximately July, 1970. . . .

Q Were you interested in the proposal?

A Yes, sir.

Q For what reason?

A As a tax shelter.

Q For all the reasons you have already given?

A Right.

Q When was it that this transaction became a reality; that is, how long after this conversation?

A It was in December, I believe. Around the middle of December, 1970.

Q Leading up to that point in time, what were the terms of the transaction to

be?

A Are you talking in reference to the escrow and so forth?

Q What were you to do? What were you to give up? What were you to gain? What was your understanding of the transaction?

A My understanding, I wasn't to give up anything. I was just to acquire the property with no down payment.

Q Were you to get title in your name?

A Yes, sir.

Q Were you to put any money up at all?

A No, sir.

Q Were you to make any payments at all?

A The payments were to be made by the property management that Mr. Keefer

handled.

Q Who were you led to believe owned the property?

A A Mr. C.B. Duluwan.

Q Who -- did Mr. Keefer ever indicate to you who Mr. C.B. Duluwan was?

A He told me it was Mrs. Simona Duluwan's father.

Q Who, in 1970, did you believe Simona Duluwan to be?

A Mr. Keefer's secretary.

Q Did you know her at that point in time?

A Yes, sir.

Q In what manner?

A In relationship to her being around Mr. Keefer and they were setting up the Montecito Inn.

Q You had met her prior to this time?

A Yes, sir.

Q In what setting?

A She used to visit my sister-in-law when they lived on Pepperdine Lane in University Village.

Q You had met this person called Simona Duluwan?

A Yes.

Q Have you ever met the person that Mr. Keefer said was her father, C. B. Duluwan?

A No, sir.

Q Did you have any reason to believe there wasn't a C. B. Duluwan?

A No, sir.

Q In terms of the actual transaction, you mentioned something and I cut you off about not having to make any payments.

What was the reason that you were led to believe by Mr. Keefer that you wouldn't have to make payments?

A He was setting up a property management corporation in Montecito and he told me that the property management would collect the rents and pay the taxes and the loan from

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the rent that he would collect from the property.

Q The rent was to cover all the expenses?

A Yes, sir.

Q Did you ever make any tax payments yourself?

A No, sir.

Q Any insurance payments?

A No, sir.

Q Any payments on any trust deeds or notes whatsoever?

A No, sir, not personally.

Q At any time, had you contemplated moving to Banning?

A No, sir.

Q Did you ever contemplate moving to this particular piece of property?

A No, sir.

Q Had you contemplated at that

time selling the home that you had just purchased on Apple Grove Lane?

A No sir.

Q Have you ever, since that date, moved from Apple Grove Lane?

A No, sir.

Q Is that still your present address?

A Yes, sir.

Q Did you ever, at any time, make a $2,000 deposit into escrow on the Banning transaction?

A No, sir.

Q Did you have occasion to sign various documents with reference to this transaction?

A Yes, sir.

Q Could you explain to the ladies and gentlemen of the jury and the Court the circumstances surrounding that.

A Well, Mr. Keefer came over to my house and had all the escrow papers and anything that pertained to the loan. He came over one day. My wife and I were there. He presented them to us.

He started talking and he told us that it was the same transaction which had occurred on our home at 338 Apple Grove Lane. I said, 'Fine.' I said, 'I will read them.'

He said, 'You don't have to read them.' He said, 'You can look at them like you did the other documents.' which was probably about a month or so later.

I said, 'Okay. Fine,' and I started signing the documents with my wife.

All the time, Mr. Keefer was talking to my wife and talking to me. He said that he was in a hurry. He had

to leave.

Q Did you read the documents?

A I skimmed over them. I didn't sit down and read them word-for-word.

Q What I mean is: Did you read them in any detail at all?

A No, sir.

Q How did you know where to sign your name?

A Mr. Keefer placed an 'X' by the lines, and told me to, 'Sign here,' and my wife also.

Q How many various documents would you estimate on this occasion that you signed?

A I can't estimate. I couldn't count.

Q More than one?

A Oh, yes, sir.

Q Did you ever go down to the

Banning area at any time and meet with the person handling the escrow?

A No, sir.

Q Have you ever met anyone, excluding yesterday, named Mr. Pearce, or John J. Pearce, or anyone having anything to do with Loyal Escrows?

A No, sir.

Q Did you ever deliver a thousand dollars cash yourself, personally, or by an agent?

A No, sir.

Q To the best of your knowledge, did your wife ever take a thousand dollars cash down there?

A No, sir.

Q With reference to some of the documents you signed, to the best of your knowledge, were any of those loan applications and financial statements?

A Yes, sir.

Q To the best of your knowledge, did you fill out that information?

A Mr. Keefer handled it for me.

Q Do you know where he obtained the information that is contained on those loan applications?

A He told me he would take it off the loan application from my previous home that I live in now.

Q As of this time, December, 1970, had you met a Mrs. Nizzia or a Mrs. Piotto?

A Before 1970?

Q Yes. Prior to December of 1970.

A No, sir.

Q Did you know who they were at all?

A No, sir.

Q Did you know that they had any

relationship to the land?

A No, sir.

Q Did you know that they were living on the property, or lived on the property?

A No, sir.

Q Did you know at that point they were going to continue to live on the property?

A No, sir.

Q Up until the time you signed the documents and the matter went through the escrow and came out of the escrow, did you ever know who C. B. Dullawan was?

A No, sir.

Q Mr. Sabau, allegedly this property was purchased for some sort of income tax savings. Were any income tax savings realized by yourself after the purchase of the property?

A No, sir.

Q Would you explain to the ladies and gentlemen of the jury why that did not come to pass.

A Mr. Keefer -- I was unable to locate him when it came time to file my income tax. I believe at the time when I asked Simona Dulawan, she said he was in Michigan on business. I told her that I needed to talk to him. She said that he wouldn't be back for a couple of weeks. I said, 'Fine.' I said, 'I have to file my income tax, and I would like to get papers from him.'

She said, 'Warren takes care of that. You will have to ask him.'

It came closer to the deadline to filing, so I excluded it from my income tax.

Q Have you at any time since hav-

ing had the title of this property in your name, at any time, even up to now, ever taken any income tax deductions or realized any savings on this transaction in Banning?

A No, sir.

Q Did you ever receive anything for -- anything of value for this transaction?

A Yes, sir.

Q Would you explain to the Court and to the ladies and gentlemen of the jury about that, please.

A Mr. Keefer -- I contacted Mr. Keefer through his property management. He came over and he told me for my trouble, and so forth, and not being able to take it for my income tax shelter, he said he would give me $250 in a check, at which time he gave me a check that was

made out through the property management corporation in Montecito.

Q To or from?

A Paid from.

Q Who was it paid out to?

A Myself.

Q Do you recall what bank it was drawn on?

A Security Pacific Bank, La Cumbre Branch.

Q What happened with that check?

A It bounced.

Q What happened?

A I kept the check for approximately a week. I called the bank and they told me they didn't have enough funds in the bank. I asked the girl at the bank if she would hold $250 when it came in. Then I held the check for $250. She said, 'Yes.'

The next time when I went into the bank for my own deposit, she told me there were enough funds and I cashed the check.

Q That is the only thing of value you ever received on the whole transaction?

A Yes, sir."

The letter which is the subject matter of this first contention was signed by defendant and used in connection with obtaining a loan on the Banning property then owned by a Mrs. Piotto and a Mrs. Nizzia, wife of Frank Nizzia for whom defendant was business agent. Sabau testified as follows with respect to the letter:

"THE WITNESS: The letter is addressed to Redlands Federal Savings and Loan, 75 Beaumont Avenue, Beaumont,

California, dated December 1, 1970.

(Reading) 'Dear Mr. Calderon: Enclosed you will find the credit application. The borrower is purchasing the property for $29,500.00. He is paying $3,500.00 down of which he has already deposited $2,000.00 in escrow.

'The seller has agreed to carry back a second trust deed for the difference between the sales price and the first trust deed. The borrower is planning on moving to the Banning area and will be transferred by Safeway Stores, Inc. He has a buyer for his present home.

'Would you please process this application as soon as possible. If you have any further questions, contact me at Area Code 805-969-1594.

'Very truly yours, Warren

Keefer.'

Q BY MR. RODEN: Sir, were you paying $3,500 down on this property?

A No, sir.

Q Had you deposited $2,000 into escrow?

A No, sir.

Q Were you at any time planning to move to the Banning area?

A No, sir.

Q Had you been, or had it been anticipated that you were to be transferred by Safeway Stores?

A No, sir."

Maurice E. Calderon, vice-president and manager for Redlands Federal, Beaumont Branch, testified that he was contacted by Mr. Keefer seeking a maximum loan commitment in connection with the sale of the property occupied by Mrs.

Piotto. The property was appraised at $24,500 and a loan of $19,500 was offered to Mr. Keefer. In making the commitment the company was concerned with the value of the property, whether it was to be owner occupied, the buyer's age and employment record, his income, the need for a co-signer, etcetera. With respect to the December 1, 1970 letter and financial statement, Calderon testified:

"Q Did the financial statement come back with a letter?

A Yes.

Q Now, we are familiar with the letter. It has already been read. Would you tell me what the significance of the letter was to you and Redlands Savings and Loan with reference to certain statements made in terms of your finally granting the loan.

A That there was going to be $3,500 down, of which $2,000 was already deposited in the escrow; that the seller was going to carry back a second trust deed for the difference between the sales price and the first trust deed.

The statement was also made that the borrower was planning to move to the Banning area, transferred by the Safeway Stores.

Q Why is that important?

A That would be an indication to us that we would have an owner occupied situation.

Q Is there also reference to having a home sold, or something like that?

A Yes. There is a statement that the purchaser has a buyer for his present home.

Q Why was that significant?

A Again, reinforcing the fact that we would have an owner occupied situation.

Q Why was it significant that the letter states that there is $2,000 deposited already in escrow?

A This would be an indication again that we had a firm transaction in the making. . . .

Q Going back for a moment to B-32, the financial statement, does that show Mr. Sabau's age?

A Yes.

Q Was that of a relevant consideration?

A Yes. We considered that.

Q What other relevant considerations were contained on that financial statement?

A One, that we had an individual that was clearly young enough to finish

that obligation if he needed to. Mr. Sabau listed his age at twenty-nine, with Mrs. Sabau's age at twenty-seven.

Q Does the fact that Mrs. Sabau was employed as well, was that relevant?

A Yes.

Q For what reason?

A We consider her portion of her earnings to be a portion of the total income for that family.

Q Was there anything else, as you look at that statement now, that was relevant in terms of making a decision to grant the loan?

A The credit record that followed, which confirmed many of these things here; certainly the fact that they had both been with their employer for better than an average length of time, for the age that they were: five years for Mr. Sabau,

and six years for Mrs. Sabau, with their respective employers.

Q So you actually corroborate, or attempt to corroborate, the information you receive directly from the applicant?

A That's correct.

Q And that, apparently, checked out?

A Yes.

Q So, in this transaction, you are relying on information you are receiving about Mr. and Mrs. Sabau; is that correct?

A That's correct.

Q Did Mr. Keefer ever indicate, or give you any information, about Mrs. Piotto or Mrs. Nizzia or Mr. Nizzia or the Montecito Investment Company?

A No."

Eventually the property was deeded back to Mrs. Piotto and Nizzia in a

transaction arranged for by defendant. Sabau eventually got $250 for his trouble. Redlands first learned of the retransfer to the original owners sometime later when the loan became delinquent. Redlands contacted Sabau who did not recognize any obligation on the loan. The concerned parties met in Banning in an effort to straighten out the matter. Redlands accepted the payments then in arrears from defendant but shortly thereafter called the loan. Mr. Nizzia paid the loan in full with his money. Defendant testified that $17,700 of the loan was previously invested on behalf of Mr. Nizzia in property in Lancaster but was lost when that property was foreclosed.

This evidence and other testimony established that the letter in question contained false and misleadin statements

and was in fact relied upon by Redlands in making the loan. In summary, there is substantial evidence in the record to support the jury's implied finding that Keefer falsely represented that Sabau was purchasing the Piotto property in Banning for personal residential use and was putting up at least 10 percent in cash on his contribution to the equity in this property. Misrepresentations regarding solvency, credit and financial condition of a prospective borrower (or of the obligor of a note) may amount to criminal fraud if relied upon by the victim. (People v. Wieger, 100 Cal. 352, 356.) Express statements of solvency are not required where all of the statements logically create that belief. (People v. Mace, 71 Cal.App. 10, 21.)

With respect to count II (the Clyde

Estate transaction) defendant is charged with obtaining $75,000 from Great Western Savings and Loan Association by means of false pretenses. In this instance Keefer induced Great Western to loan Thomas Bryan $75,000 to be used for the purchase of Santa Barbara real estate in reliance upon an alleged grossly distorted description of Bryan's net worth and a misrepresentation concerning Bryan's present intention to live on the property.[2] With respect to this loan application Keefer testified:

"Q BY MR. WESTWICK: [for defendant Keefer] Do you know if an application was sent out?

A Eventually, yes.

Q And when you say you don't know,

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[2]Thomas Bryan was defendant Keefer's brother-in-law.

you are referring to you don't know exactly when in the course of events it went out?

A No, I don't remember.

Q Was this a loan application that Great Western caused to be sent out?

A Yes.

Q To whom, if you know, was it sent?

A I can't remember.

Q Did you receive it?

A Eventually, yes.

Q Before or after it had been filled out?

A Before.

Q You received it before?

A Well, I know I was at Mr. Bryan's home and the application was there at that time, so it was given to me and my brother before it was filled out.

Q Did you personally have anything to do with the filiing out of that loan application?

A No, I did not.

MR. WESTWICK: Just to keep us straight, may I see R-10, Mr. Coombs?

[Clerk complies.]

THE COURT: Did I understand you to say, Mr. Keefer, that you saw that at Mr. Bryan's home, and that it was given to you and your brother to fill out?

THE WITNESS: That is essentially correct, your Honor.

THE COURT: I merely ask if that is what you said?

THE WITNESS: Yes, sir.

Q BY MR. WESTWICK: I am going to show you what is in evidence as R-10 and ask you if that is the form of loan application that you have just referred to?

A Yes, it is.

Q Now, did you personally have anything to do with the filling out of that loan application?

A I did not personally fill it out.

Q All right --

THE COURT: That isn't the question.

MR. WESTWICK: Well, it's pretty close to it.

THE COURT: I'm just trying to ask that the witness listen to the questions. The question was whether you had anything to do with it?

THE WITNESS: Yes, sir, I did.

Q BY MR. WESTWICK: Did you personally fill out any of the written part of that form?

A No.

Q Did you supply any of the information that comprised the written answers

to the questions on the form?

A Yes.

Q And how did that come about and why?

A Well, to begin with, I don't type, so this would have been typed by my brother who was working with me at the time. This application, the information, was gathered from a few sources: Tom Bryan, my sister, and information that I had on hand; also information, like deposits that I had been doing for Tom."

Beverly Hill, a loan officer for Great Western, testified:

"Q What does a loan officer do?

A We approve loans, make loans, look at loans.

Q Can you give us kind of a quick summary of the kind of steps and procedures you take in the general, or normal

requests for making a loan on a piece of property?

A We take the request, order an appraisal, get an application, order a credit report verification, and put the package together for approval.

Q What are the kinds of things that you are interested in, or concerned about, when Great Western is considering loaning on a particular piece of property?

A That the applicant can afford the property, and that the property is good security for the loan.

Q So there are basically two very general considerations: whether the land is worth what the indebtedness against it is; and two, whether or not the buyer can, what we would call, service the debt?

A True.

Q Or service the loan?

A Yes.

Q In 1972, did you have some contact with a request to put a loan on some property on Rametto Road in Santa Barbara?

A Yes. . . .

Q BY MR. RODEN: You were the loan officer, with the exception of having final approval, on this case, were you not?

A Yes.

Q You put the package together, so to speak?

A As I said, we worked through loan agents at the time. Our loan agent packaged the file, then he would give it to me. I would review the file, do an analysis on it. If it were over my approval authority, to go to Mr. LaBarr. That is what happened in this case. Our loan agent packaged it.

Q In this case, the loan was in excess of $50,000?

A Right.

Q It was finally approved by Mr. LaBarr; is that correct?

A Yes.

Q Looking at the file if you need it, can you tell me the date that your particular file was opened?

A He made application on November 6th of 1972. I would assume that to be our first contact. It would be shortly thereafter. We would have received the application through some means, mail or delivery, or whatever.

Q When you say 'he,' who are you referring to?

A Mr. Bryan.

Q Does your file reflect, or does your memory reflect, personal contact

with anyone named Thomas E. Bryan?

A No, not myself.

Q Does the file reflect how the -- for example, the application that you just made reference to, how that was either delivered or picked up?

A No, it does not. I wouldn't be able to tell how we received it. . . .

Q Does your file reflect at all contact with -- personally, with a Mr. or Mrs. Bryan?

A No. I am sure it doesn't.

Q With reference to the first half of your determination -- that is, the value of the land and whether it will support the debt against it -- does your file reflect that investigation into that matter was made?

A Yes.

Q What was the result of that

investigation?

A We show an estimated valuation of a hundred thousand, which was also the sale price of the property.

Q Who does that evaluation for you?

A Our appraiser, our staff appraiser.

Q You have someone that is hired by Great Western as an employee to do that kind of work?

A Right.

Q Directing your attention to the second half of your investigations, and calling your attention back to the application, the information form, which we have marked R-10, and also the financial statement, can you get that out again, please.

(Witness complies.)

Q I wonder if you could just take

a look at that, and in your own words, tell me the significant portions --

Do you make a recommendation to Mr. LaBarr about whether or not he should finally approve the loan?

A In some cases, yes; in some, no. We work together. Sometimes, if he is out of the office, I might do something, or he might do it and have me sign it. That was the --

Q Did you draw a preliminary conclusion on this particular case?

A I did. I worked up an analysis, right.

Q Your analysis was favorable to the granting of the loan?

A Yes, the figures were. Right.

Q Did you rely on this applicant form, R-10?

A Yes, I did.

Q Could you take a look at that form and tell me the significant pieces of information on it, as you saw it in November, or thereabouts, of 1972?

A I would say most significant, probably, was his employment, which was verified.

Next, he indicated that he was selling his property in Westlake Village, and that there would be quite a substantial equity there that he would be using as part of the down payment.

He indicated that there was a large -- two large savings accounts.

Q Would you point those out for us?

A Security Pacific Bank in Westlake, $16,000. A deposit to be placed in escrow with a federal credit union, $10,000.

Q Why is employment important, or

why do you place importance on that?

A Job stability means a lot as to whether or not the applicant can repay the debt.

Q Do you see the figures here of -- line 6 of the applicant information form? That would be on the backside, I guess.

A Yes.

Q (Indicating) 'Psychology consultant, 11,400 a year'?

A Right.

Q 'Psychology consultant/rental unit,' what significance did that have?

A Quite a bit because, of course, he could not qualify for the loan at his $20,000 a year salary that he had; but, with the additional salary and rental income that was indicated on there -- also, I might say that because he had been --

I believe on the verification, it indicated since 1968 -- we don't use part-time employment unless we can establish that it would be stable. In his case, I felt that that was quite a stable amount of time, and I did rely heavily on that verification that I had.

Q So you did rely on this extra income as the most important facet of it?

A Yes, we did. We needed all of it. He couldn't qualify without it. We had a verification that was signed, and looked legitimate to us.

THE COURT: That is to his employment?

THE WITNESS: As to his outside employment as a clinical psychologist, right. It was --

Q BY MR. RODEN: That has been marked R-12 or 13. I have forgotten.

A That indicated that he had been

there since January of 1968.

Q Why the reliance on large sums in checking accounts, like $16,000, and then the $10,000 in this federal credit union?

A We not only worry about whether he has the initial down payment, but we worry whether or not he would have any cash reserves after the purchase to fall back on. We used all these figures in making our analysis.

Q Why are you concerned about cash to fall back on?

A In the event of -- well, property of that size and price, of course, is going to require a lot of money to keep it up: repairs, maintenance, and so forth. We do rely on that.

Q So, in addition to just the $505 a month to pay off principal and interest,

you are concerned about other expenses?

A The taxes, the fire insurance, and the general upkeep of a property that size.

Q I take it if those things aren't done, that jeopardizes, to a certain extent, your investment?

A Very much.

Q Directing your attention, I guess, to what is really the first page, although here it is the second page --

A Okay.

Q Line -- about the third or the fourth line down. It says 'Occupancy.' Do you see that?

A Yes.

Q What significance is that little square that is checked off that says, 'I will occupy property on March, 1973'?

A We would probably not consider

a loan of that size to a person that was going to purchase it for other than occupancy.

Q Why is that?

A Because he couldn't afford to rent it out. We wouldn't make a loan of that type to have the property rented, and we would assume that he did indicate that he was going to live in it, and he was selling some other home, so, naturally, that was a large factor.

Q Was it important that the person live on the property as opposed to buying it for an investment, or whatever?

A Well, in his case it would be because he would not be able to make the payments on it if he were not living in it, and he also had another property.

Q Why is it important that you see to it that the buyer use his or her own

capital in making the down payment as opposed to borrowing that as well?

A Because they normally can't afford to buy the home and make the payments on the new home and also pay back the capital that they have borrowed because that would increase their monthly liability, normally, to a point where they couldn't afford it. . . .

Q Your file does show a phone call from either Pate or his lawyers?

A I think they were in my office, but I am not sure.

Q Your first contact with Mr. Pate, or anyone acting on his behalf, was after you paid out the $75,000?

A Yes.

Q Does your file reflect anywhere the personal indebtedness of Mr. Bryan for $250,000 to a Mr. Kenneth G. Parker?

Do you find that on the application, credit application, anywhere?

A No, it is not on the application.

Q What significance would that have had that a person just bought a large piece of property in the Goleta/ Isla Vista area and became personally indebted for a quarter of a million dollars and is also indebted on a trust deed for $200,000; what effect would that have had on your decision in this case?

A Naturally, we would have questioned it to find out whether it was an income-producing property and where the money came from to put into it, and that kind of thing.

Q Does your file reflect any of that being disclosed to you?

A No.

Q Had you known that Mr. Bryan did

not intend to live on the property, and that there was not the kind of money in these accounts, and that there wasn't this kind of income on the side as a psychology consultant, would you have made this loan, or the recommendation to Mr. LaBarr to make the loan?

A No.

MR. WESTWICK: Your Honor, that misstates what is shown. The 'income,' where you have the 'psychology consultant,' it says 'Other Employment or Rentals,' or something to that effect. It is not limited to psychology --

MR. RODEN: I am relying on the testimony that he didn't receive a dime for being a psychology consultant.

MR. WESTWICK: He did receive some rentals, and that is lumped together under that heading on the document, is

it not?

MR. RODEN: There was also an exhibit, Mr. Westwick, which somebody signed saying that he was making $500 a month as a psychology consultant, which Mr. Bryan says wasn't true.

THE COURT: Overruled. Go ahead.

You may answer the question.

Q BY MR. RODEN: Do you have the question in your mind?

A No.

Q I have written it down here, though.

A Okay.

Q Would you have made the same favorable recommendation to Mr. LaBarr on this matter had you known that Mr. Bryan did not intend to live on the property, and had known that much of the financial information for these bank

accounts was not true, had you known that Mr. Bryan did not have this extra income as a psychology consultant?

A No.

Q Furthermore, would you have made this loan had it been disclosed to you that Mr. Bryan was now personally indebted in the amount of a quarter of a million dollars on a piece of property in the Isla Vista area?

A No.

Q Ultimately, your company, your institution, agreed to allow Mr. Pate to assume the indebtedness of $75,000 --

A Right.

Q -- is that correct?

A That is true.

Q And that was based on Mr. Pate's own financial statement, his credentials?

A That is true.

Q Had you known at the time that Mr. Bryan was being loaned $75,000, that there was, in fact, negotiation going on between Mr. Pate and Mr. Bryan and Mr. Brundage, and knowing that there was going to soon be an assumption by Mr. Pate, what would the reaction of Great Western have been?

MR WESTWICK: That assumes a fact not in evidence, that the Pate transaction was not concluded at that time. It was simply something in consideration, and to assume in your question that the Pate transaction was a fait accompli misstates the evidence.

MR. RODEN: That may be correct, your Honor. I ask that it come in under the Court's power to alter the proof. Mr. Pate will be a witness this morning, I hope.

THE COURT: You may answer.

THE WITNESS: You want to know whether or not we would have made the loan then if Mr. Pate --

Q BY MR. RODEN: Had you known Mr. Pate was coming in later to assume, would you have made the loan to Bryan?

A No."

It is argued that because the property was resold to Pate who assumed the loan, Great Western suffered no loss. The fact that no pecuniary loss was suffered is immaterial. (People v. Randono, 32 Cal.App.3d 164, 173.) The intent to defraud is manifest in the use of false statements caused to be conveyed by defendant to the loan company over Bryan's signature.

With respect to count V (the Fontainebleu transaction) defendant is

is charged with defrauding Sanford Ross of $155,000. The evidence offered on this charge revealed that Keefer sold a second trust deed for $120,000 to Ross primarily on the strength of Keefer's false representation that the same Thomas Bryan, the maker of the note, had paid into escrow a quarter of a million dollars in cash to purchase the Fontaine-bleu Apartments. It is argued that there is no competent evidence to support the proposition that Keefer represented to Ross that Bryan had made a $250,000 cash down payment to Parker. It is also argued that there is no evidence of a plan or intent to defraud Ross.

With respect to count VI (the State Street transaction) defendant is charged with defrauding Anne and Hathan Wohl of some $18,000. The evidence offered on

this charge established that the Wohls were induced by Keefer to purchase a fictitious second trust deed from Patrick McCabe by false statements as to the genuineness of the obligation, the value of the property and that a number of payments had been made on the note. It is argued that this transaction is nothing more than an ordinary private business transaction "involving, at worst, some sharp practices, that the People have sought to elevate to the status and dignity of crime."

We respond to the argument of insufficiency of the evidence in general and more specifically as it is directed to counts V and VI by a reference to the rule affirmed in People v. Bassett, 69 Cal.2d 122, 138, wherein it is said that our function "begins and ends with a de-

termination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." We need only refer to the statement of the evidence contained in the People's brief to conclude that defendant has failed to make a fair and adequate statement of all the evidence contained in this voluminous record.[3] It would serve no purpose in this unpublished opinion to attempt to set forth all of the testimony. Suffice to say that the portion of the testimony set forth supra, the testimony referred to by the People in their brief and other evidence in the record, coupled with the

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[3]The clerk's transcript is composed of 944 pages and the reporter's transcript of 2585 pages.

reasonable inferences to be drawn therefrom, lends substantial evidentiary support for conviction on all four counts.

We turn next to the contentions of error in the admission of evidence. In this respect the argument is threefold. First, it is claimed that the trial court erred in permitting defendant to be cross-examined beyond the scope of his direct examination as to "modus operandi," second, to permit the introduction of evidence of "modus operandi" per the witnesses Patrick J. Campbell and Randall Sabau in rebuttal and, third, to admit the "modus operandi" evidence under any circumstances. The evidence in question had to do with transactions involving two properties referred to as De La Vina Street and Schoolhouse Road, neither being the subject of any criminal charges

in this indictment.

The objections made to this evidence at the time of cross-examination were that it was "beyond the scope of the direct examination" and that it was irrelevant to the issues. Prior to the rebuttal testimony of Mr. Campbell, the following took place:

"MR. WESTWICK: [for defendant Keefer] Your Honor, it seems to both Mr. Crandall and I that we have run into a very substantial question of law -- or that we are about to, I should state more accurately which both he and I would like an opportunity to address before we go into these things. It seems to me we might be headed for thin ice if we don't address this question of law before we address the evidence.

MR. CRANDALL: [for defendant Parker]

We would like to do it, your Honor, outside the presence of the jury.

THE COURT: Certainly.

What do you have in mind?

MR. RODEN: [for the People] To call a witness who is present now, Mr. Campbell, and ask him three or four questions.

THE COURT: In regard to this deal?

MR. RODEN: Yes, your Honor.

This has been alluded to during Mr. Keefer's -- not just alluded to, Mr. Keefer was questioned at length about these transactions --

MR. WESTWICK: By you.

MR. RODEN: Correct.

MR. WESTWICK: I think that is something we ought to take up, your Honor.

THE COURT: All right.

Do you have another witness

that you could use?

MR. RODEN: No, your Honor. I am lucky I have him.

THE COURT: All right.

Would you be kind enough, ladies and gentlemen, to recess and wait for us outside the courtroom. The usual admonition. The Bailiff will call you as soon as we are ready.

[The following proceedings were held in open Court out of the presence of the jury.]

THE COURT: Let the record show that the jury has retired from the courtroom.

This is in regard to 2-A and B?

MR. RODEN: Yes, your Honor.

Just as an offer of proof, the prosecution is prepared to show as -- for two purposes: To impeach Mr. Keefer directly on what he said about Mr.

Campbell's involvement on De La Vina Street -- that is, Mr. Campbell is prepared to testify that he signed various documents simply because Mr. Keefer showed them to him and asked him to sign, which was not unusual, and has no idea in the world why they put this property in his name. The evidence would show that the reason for it was obviously to create trust deeds to sell and assign to persons in order to raise money, which has been the reason why we have been here for four weeks.

Point two is to show a common plan and scheme and design of this using dummy straw people to place real property in their name to make it look and appear to be a legitimate transaction to all of the world, except as and between the persons who are responsible; and at that

time, could go and, by that false pretense, obtain money from persons on those trust deeds that are created. That is the purpose of the offer.

It is practically the same thing that is involved on De La Vina. It will be the same thing we will offer on Schoolhouse and it is the same thing they did in Banning. It is the same thing they do on the Fontainebleu, and it is the same thing they do on State Street. With the variations, it is certainly the same thing they do on the Clyde Estate.

MR. WESTWICK: The first point I would like to make is that Mr. Roden has, sometime past, rested his case in chief. Mr. Crandall called no witnesses. I called one witness, Mr. Keefer.

Mr. Keefer, on direct examination, never once mentioned Banning --

correction -- never once mentioned De La Vina or Schoolhouse. Never once did he mention that. The only mention of these properties came out on cross examination by Mr. Roden. He cannot create a possibility of opening, reopening, the case simply by examining my client on some extraneous piece of property.

I objected to that evidence at the time, on the grounds that it was outside of -- your Honor admitted it on the scheme and design and so forth, which I intend to renew my motion to strike at such time as Mr. Roden concludes his case, but it would be premature now, I think.

He can't get into this wholly extraneous matter, now, on the face that it is impeachment when he, himself, brought the matter up over objection on the theory that it showed modus operandi

and scheme and so forth.

Secondly, if he is offering it now for the second reason, not impeachment, but for the second reason he now states; namely, to show modus operandi and so forth, quite obviously, he should have done so in his case in chief.

He closed his case in chief when he rested. He is now restricted in his rebuttal to rebutting the evidence that Mr. Crandall and I have put on. Neither one of us touched De La Vina Street or Schoolhouse or any other transactions that weren't directly involved in this case, with the possible exception of the Montecito Inn. We did -- there was testimony on direct about the Montecito Inn, but nothing about De La Vina Street or any other.

Now, Mr. Roden is opening up a

whole new case. We have here a stack of documents, there must be at least twenty-five documents, and he is alluding here on De La Vina Street to what appears -- looking at Exhibit 2-B for identification -- to consist of at least twenty-five different transactions and so forth. Perhaps your Honor might have felt that this would come in to show scheme or modus operandi or so forth, but certainly it was incumbent on Mr. Roden to do that in his case in chief and not to bring it in as an afterthought when he is restricted to rebuttal.

It doesn't rebut anything we have put on. It seems to me totally improper; but not only that, at this point in rebuttal, it widens this case immeasurably. We are at the point where we are practically ready to argue, sub-

ject to proper rebuttal evidence.

MR. CRANDALL: On behalf of the defendant Parker, your Honor, I join in Mr. Westwick's objection, but I think -- from Mr. Parker's standpoint, it is clearly -- it would be error to go into this for the reason Mr. Parker rested and relied on the case in chief of the prosecution, and now to bring this in by way of rebuttal to show a common scheme or design or motive of things of this nature, it is clearly not proper rebuttal evidence. Mr. Parker was entitled to rest on the evidence introduced as part of the case in chief of the People.

MR. RODEN: Your Honor, in response, I don't want to create error. Mr. Keefer testified on the stand that each of these transactions, the ones that we put in in our case in chief that he was indicted

on, were legitimate; that the facts, as they appear to rational people, were not that way, that they occurred in legitimate methods and manners. He opened up, I think, by that method of defense and those statements an area which would allow us to show that the same people were involved in this suit. Mr. Campbell, on De La Vina, is the same Mr. Campbell involved on the house on Rametto Road. Mr. Sabau is the same Mr. Sabau involved in Banning on the exact same kind of transaction. I submit that Mr. Keefer opened the door.

To Mr. Crandall's point, I simply would point out that if anything were to come of this transaction involving Mr. Parker that he felt he had to answer, Mr. Parker is entitled to resubmit himself to the stand before this jury

to testify. It's not too late. Therefore, he has another opportunity to testify, which is known as surrebuttal and he would have every opportunity to explain the circumstances that involve him in this transaction, if any.

THE COURT: If he chose to.

I am going to overrule the objections and admit it and have the jury come back in. The reason for this, of course, is that I don't want you to go too far in this. I mean, these are not going to be argued.

MR. WESTWICK: Your Honor, may I inquire of your Honor as to whether or not the evidence is being admitted as rebuttal to Mr. Keefer or is being admitted to show modus operandi, scope, design, and the like?

THE COURT: I am going to admit it on all grounds, because that is the only safe thing to do, naturally. Also, it goes to the credibility of the witness."

First with respect to the substantive objections, we note that under Evidence Code sections 351 and 352, the trial court is given wide discretion in the admission of evidence. Evidence Code section 1101 subdivisions (b) and (c) provide:

> "(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.
>
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

The trial court in the instant case, in a so-called section 402 hearing, determined that the evidence pertaining to the De La Vina and Schoolhouse transactions was relevant on "all" grounds including credibility, presumably referring to the grounds set forth in section 1101 subdividions (b) and (c). The evidence was offered by the prosecution on the issue of credibility as well as to prove state of mind. If otherwise correct, the specific ground relied upon by the trial court in ruling on the objections is immaterial on appeal. (Wilcox v. Berry, 32 Cal.2d 189, 192.) We have examined the record pertaining to these uncharged transactions. Factually they bear a number of similarities to those involved in the charged offenses. Both involved the creation of trust deeds for

the purpose of sale, similar parties were used in the transactions and defendant was closely connected with each. The defense in this case is based upon the proposition that these transactions, while perhaps not entirely regular, did not amount to theft because defendant did not have the requisite mental state to be guilty of the crimes charged. The evidence in question logically, naturally, and by reasonable inference tended to establish defendant's state of mind with respect to intent, as well as the other facts set forth in section 1101 subdivision (b), and was therefore material with respect to his credibility. (Evid. Code, §§ 780, 1101 subd. (c); People v. Sykes, 44 Cal.2d 166, 170.)[4] There was no abuse

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[4]The jury was instructed that in determining credibility "any matter that

of discretion in its being admitted for these purposes.

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[4]continued

has a tendency in reason to prove or disprove the truthfulness of his testimony" may be considered. With respect to other offenses the following instruction was given:

"Evidence has been received tending to show that the defendant committed acts other than that for which he is on trial.

Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.

Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

1. The identity of the person who committed the crime, if any, of which the

Second, assuming arguendo, that there were procedural errors in admitting

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[4]continued

defendant is accused;

2. A motive for the commission of the crime charged;

3. The existence of the intent which is a necessary element of the crime charge;

4. A characteristic method, plan or scheme in the commission of acts similar to the method, plan or scheme used in the commission of the offense in this case.

For the limited purpose of which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose."

this evidence on cross-examination and rebuttal, we are satisfied from our examination of the entire cause that the matters of procedure complained of have not resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; People v. Watson, 46 Cal.2d 818, 834-838.)

We next turn to the allied contentions that defendant should have been prosecuted under Penal Code section 532a subdivision (2) rather than 487 subdivision 1 and that the failure of the trial court to instruct sua sponte on lesser included offenses embodied in sections 532a subdivisions (1) and (2) was reversible error.[5] The issue was first raised

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[5]Section 532a provides in pertinent part:

"Any person--

below by then defendant Thomas Bryan and rejected by the trial court on the

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[5]continued

(1) Making false statement. Who shall knowingly make or cause to be made, either directly or indirectly or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay, of himself, or any other person, firm or corporation, in whom he is interested, or for whom he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the execution of a contract of guaranty or suretyship, the discount of an account receivable, or the making, acceptance, discount, sale or endorsement of a bill of exchange, or promissory note, for the benefit of either himself or of such person, firm or corporation; or

(2) Benefiting by false statement. Who knowing that a false statement in writing has been made, respecting the financial condition or means or ability to pay, of himself, or such person, firm or corporation in which he is interested, or for whom he is acting, procures, upon the faith thereof, for the benefit either of himself, or of such person, firm or

authority of People v. Breyer, 139 Cal. App. 547, 550, which held that section 532a (enacted in 1913) was superseded or repealed by necesssary implication upon the Legislature's enactment in 1927 of Penal Code section 484, which merged various theft statutes into one statute describing the crime of grand theft. Defendant implicitly concedes that Breyer

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[5]continued

corporation in which he is interested, or for whom he is acting, procures, upon the faith thereof, for the benefit either of himself, or of such person, firm or corportion, either or any of the things of benefit mentioned in the first subdivision of this section; or

(3) Reaffirming false statement; punishment. Who knowing that a statement in writing has been made, . . .

shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment."

would be dispositive of the issue even on appeal except for the fact that "in 1935, after Breyer was decided, the Legislature renumbered and, by ... necessary ... implication, reaffirmed section 532(a) [sic 532a] as an existing and enforceable statute. See West's Annotated Calif. Codes, Penal Code sections 447 to 680. p. 560." In answer to that we point out that what the Legislature actually did in 1935 was to renumber quite a different statute -- one having to do with offering real estate by lottery or with admission tickets -- which inexplicably was given the same number as the section which concerns us here, having to do with the obtaining of property by means of false financial statements. (Cf. the "Historical Note" provided by West's Annotated Pen. Code for § 532a with that

provided for what is now § 532c.) Section 532a is no more applicable to grand thefts now than it was forty-two years ago when Breyer authoritatively disposed of it. Under the circumstances it was proper to prosecute under section 487 subdivision 1 and not error to fail to instruct under section 532a subdivisions (1) and (2).

We next consider the claim that the indictment was invalid and therefore the conviction thereunder must be reversed.

It is argued that, by failing to advise the grand jury in accordance with Penal Code section 939.8[6], that body had

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[6]Section 939.8 provides:

"The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury."

no legal standard by which to evaluate the evidence presented in reaching its conclusion to return and indictment. Relying upon Johnson v. Superior Court, 15 Cal.3d 248, defendant contends that, in requiring the evidence to "warrant a conviction by trial jury," the Legislature establish a higher standard than that required for proceeding by way of information in order to prevent the grand jury from being a "rubber stamp for a district attorney." Absent any showing by defendant that the jury so acted or that he was in fact prejudiced, the argument is unpersuasive. (People v. Fujita, supra, 43 Cal.App.3d 454, 475.)

We do not agree with the premise that the Legislature fixed or intended to fix a different standard. We find nothing in Johnson, supra, so indicating. In

fact, Johnson has nothing whatsoever to do with section 939.8 and defendant's reliance thereon is misplaced. While it is true that Penal Code section 995 requires that the indictment must be set aside if a person "has been indicted without reasonable or probable cause," case law has never required that a grand jury indictment must be based on evidence sufficient to "warrant a conviction" before or after the addition of section 939.8 in 1959. As early as 1956 it was observed by this court in People v. Rissman, 143 Cal.App.2d 488, 494, when considering the denial of a motion to dismiss a grand jury indictment:

> "To warrant the denial of a motion under section 995 of the Penal Code, it is not necessary that the proof be so complete as to justify a conviction of the accused. Probable cause is shown if a man of ordinary

> caution would be induced by the evidence, heard by the grand jury, to believe and seriously entertain a strong suspicion of the guilt of the accused. (Bompensiero v. Superior Court, 44 Cal.2d 178, 183 [281 P.2d 250].) An indictment will not be set aside if there is some rational ground for assuming the possibility that an offense had been committed and the accused is guilty of it. (Ibid.)"

Following Rissman, it was said in People v. Britz, 17 Cal.App.3d 743, 750-751:

> "To warrant the denial of a motion under section 995 of the Penal Code, it is not necessary that the proof be so complete as to justify a conviction of the accused. Probable cause is shown if a man of ordinary caution would be induced by the evidence, heard by the grand jury, to believe and seriously entertain a strong suspicion of the guilt of the accused. (Bompensiero v. Superior Court, 44 Cal.2d 178, 183 [281 P.2d 250].) An indictment will not be set aside if there is some rational ground for assuming the possibility that an offense had been committed and the accused is guilty of it.' (People v. Rissman (1956),

143 Cal.App.2d 488, 494 [299 P.2d 944].)"

True section 939.8 is not referred to in either of these cases, however, in Cotton v. Superior Court, 56 Cal.2d 459, 56 Cal.2d 459, 461-462, the Supreme Court did refer to both sections in weighing the sufficiency of the evidence to support a grand jury indictment, saying:

"Section 939.8 of the Penal Code provides that the grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted would, in its judgment, warrant a conviction by a trial jury. Section 995, subdivision 2, of the Penal Code provides that the court must set aside the indictment upon motion of the defendant when the accused '... has been indicted without reasonable or probable cause.' Probable cause is shown if a man of ordinary caution or prudence could entertain a strong suspicion of the guilt of the accused, and if some rational ground exists for an assumption of guilt, the in-

dictment will not be set aside. (Bompensiero v. Superior Court, 44 Cal.2d 178, 183 [281 P.2d 250].)"

The fact that the Legislature did not see fit to alter the time honored rule of reasonable or probable cause contained in section 995 either at the time of enacting section 939.8 or thereafter, leads to the conclusion that no new or different standard was intended by that body in enacting the latter section. It is more reasonable to assume that section 995 contains a minimum standard whereas section 939.8, if anything, dictates a maximum. In any event it has not been shown that the grand jury procedure followed in this case has prejuduced defendant's position. Defendant has not attempted to show that the evidence presented to the grand jury was not sufficient under the

maximum requirement of section 939.8 or that that body did not regularly perform its function. In this case we may safely presume that an official duty has been so performed. (Evid. Code, § 664; Cf. People v. Boehm, 270 Cal.App.2d 13, 23.)

Defendant also contends that the appointment of a "retired" judge to preside over the pretrial and trial proceedings was violative of the equal protection clauses of the state and federal Constitutions rendering his conviction void.

The thrust of this argument is that the Constitution of California in article VI, section 16 subdivision (b)[7] requires

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Article VI, section 16 subdivision (b) provides in part:

"(b) Judges of other courts shall be elected in their counties or districts at general elections."

that a judge be "elected" and since, at the time of the Keefer matter neither of the judges handling the case was then an elected judge, they were not authorized to serve absent a stipulation of the parties under article VI section 21.[8] We visualize no reason to indulge in a strained construction of the Constitution to reach the result advocated by defendant. It appears without argument that the two judges involved were at one time duly elected judges of the superior court. By retiring their status of having been elected to office does not change. It simply denotes a change in present status

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[8]Article VI, section 21 provides:

"On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause."

Not in the fact that each was and will continue to have been an elected judge, although no longer active.[9]

Conceding that the Constitution pro-

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[9] In Estate of Zahn, 16 Cal.App.3d 106, 116, it is said:

"Appellants further contend that the trial judge lacked authority and jurisdiction to sit when the matter was heard and determined. On March 13, 1969, and on June 13, 1969, respectively, Judge Faries, 'Retired Judge of the Superior Court' was assigned by the Chief Justice of the California Supreme Court, Roger J. Traynor, to sit as a superior court judge from April 1, 1969 to September 30, 1969. The matter came before Judge Faries during this period and was passed upon by him prior to the expiration of his term. The validity of his assignment is established by California Constitution, article VI, section 6."

We note that in this case the retired judge acted "prior to the expiration of his term." We are not advised of the exact status of the two judges in the instant case in this respect but we are satisfied that the expiration of the term does not deprive the individual of his status as an "elected judge."

vides in article VI section 6 that "A retired judge who consents may be assigned to any court," by the Chief Justice, it is argued that under those circumstances the consent provisions of section 21 supra are activated. We do not agree. Such consent is required when a member of the State Bar (an attorney) is appointed to serve as a temporary judge in a given case. In People v. Tijerina, 1 Cal.3d 41, 48, it is said:

> "Defendant contends that the order is void on the ground that no stipulation was entered into permitting the commissioner to act as a temporary judge in the case in which it was entered. We agree with this contention.
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> As revised in 1966, section 21 of article VI of the California Constitution provides:
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> 'On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered

to act until final determination of the cause.'

The purpose of the Constitution Revision Commission in proposing this revision was to restate the substance of the existing section (then art. VI, §5)[5] concisely in modern terms (see Proposed Revision, surpa, fn. 1, p. 98; Estate of Soforenko (1968), 260 Cal.App.2d 765, 766 [67 Cal. Rptr. 563]) and to extend the authority to use temporary judges to justice courts. (See 1967 Judicial Council Report, p. 89.) Both before and after the 1966 revision of article VI, however, a stipulation of the parties was constitutionally required for one not occupying the office of judge to serve as a temporary judge. (In re Chapman (1956), 141 Cal. App.2d 387, 390 [295 P.2d 573]; In re Wales (1957), 153 Cal.App. 2d 117, 119 [315 P.2d 433].) To the extent that Martin v. Martin (1963) 215 Cal.App.2d 338, 339 [30 Cal.Rptr. 293], is to the contrary, it is disapproved." (Emphasis added.) (Fn. omitted.)

In People v. Wells, 13 Cal.App.3d 265, 277, we find the following:

"Appellant has argued that Judge Arden T. Jensen, who presided at the trial of this case,

was not properly authorized to preside because there was no sufficient stipulation by counsel, and furthermaore 'that even if his counsel stipulated to Arden Jensen presiding at the trial of this case, the stipulation was ineffective because appellant did not personally concur.' The complete answer to this contention is that Judge Arden T. Jensen, prior to the time of the trial, had been assigned by the Chairman of the Judicial Council, pursuant to article VI, section 6 of the California Constitution, to sit as a Judge pro tempore of the Santa Barbara Superior Court and a stipulation of the parties was therefore unnecessary."

We are unimpressed with the suggestion that the procedure employed in this case creates "two classes of persons - one whose alleged crimes are tried by elected judges and another whose alleged crimes are tried by unelected judges." To the contrary the Constitution creates two classes of judges - active and retired, in which there exists a legitimate

state interest and which is not inherently suspect. The so-called "two classes of persons" supra, are but the inevitable consequence of the classification of judges created by the Constitution.

Finally, it is contended that defendant did not receive the effective assistance of counsel guaranteed by the state and federal Constitutions. As illustrations of the alleged incompetence it is pointed out that trial counsel failed to move to set aside the indictment on the ground of lack of reasonable or probable cause, failed to object to the introduction of business records as hearsay, failed to move to dismiss the indictment because the People were proceeding under the general theft rather than the more specific statute supra, and failed to request instructions on lesser included

offenses, supra. As a corollary of this argument it is contended that the revocation of his own recognizance status immediately before trial, couped with imposition of excessive bail, hampered the defense.

We have examined this contention in light of these specific claims of error and conclude that same fail to merit a reversal of the case. A reversal on the grounds set forth is warranted only in an "extreme case." (People v. Ibarra, 60 Cal.2d 460, 464.) The failure to object to the admission of evidence will be regarded as a strategic decision of counsel unless it results in withdrawing a "crucial defense" and reduces the trial to a "farce or sham." (People v. Najera, 8 Cal.3d 504, 516.) In view of our ruling herein as to the indictment itself and

the propriety of proceeding under the general theft statute, we cannot say that defendant has sustained his burden of proving that he was deprived of a fair trial by the action or inaction of counsel. Furthermore, he has not shown that the mere fact he was in custody during trial adversely affected the outcome of the case. (People v. Brown, 184 Cal.App. 2d 588, 596.)

In a closing brief defendant contends for the first time on appeal that the conviction of count I must be reversed because it was barred by the three year statute of limitations. In support of this contention it is argued that under the case of People v. Zamora, 18 Cal.3d 538, the indictment must allege and the prosecution prove the date on which the commission of the offense was discovered,

how and by whom it was discovered, a lack of actual and constructive knowledge of the date of commission prior to actual knowledge and the reason why the date of the commission of the offense was not discovered earlier.

We note that the issue was raised in the court below by demurrer to the indictment. Pursuant to stipulation count I was amended to include the allegation that the "crime was not discovered until some time in the period between December 1, 1974 and February 15, 1975." The demurrer was then overruled as being moot. Following trial the issue of the statute of limitations was submitted to the jury pursuant to the following instruction requested by defendant:

"This action was commenced on June 26, 1975. Count I of the indictment in this

action charges the defendant Keefer with the crime of grand theft and alleges that the offense was committed between November 22, 1970 and January 11, 1971. Count I of the indictment further alleges that ' . . . the said crime was not discovered until some time in the period between December 1, 1974 and February 15, 1975.'

California law provides that an indictment for grand theft must be filed within three years after the discovery of the theft. If the indictment is not filed within three years after discovery of the theft, an action cannot be maintained agaisnt the person accused of the theft.

Therefore if you should find, as to Count I against the defendant Keefer, that the indictment in this action was

filed more than three years after the alleged theft was discovered by Redlands Federal Savings and Loan Association, you must render a verdict of not guilty as to that Count."

The amendment and the instruction correctly stated the statutory law as it existed at and prior to the time of trial in 1975. Penal Code section 800 as amended provides in pertinent part: "An indictment for grand theft . . . shall be found . . . within three years after its discovery." The additional requirement of pleading and proof of reasonable diligence was not mandated by case law until Zamora came down December 16, 1976. Although the propriety of such pleading was touched upon in People v. Swinney, 46 Cal.App.3d 332, 345, decided March 21, 1975, the requirement was not mandated

until exactly one year after judgment was entered in the instant case. In view of the stipulation of counsel and acquiescence of the trial court in the amendment, coupled with the instruction requested by defendant and given by the court, it is obvious that all concerned were unaware of any need to plead reasonable diligence, much less of the need to plead and prove such as was to be later required by Zamora, supra. As was said in Swinney, supra, "The failure was justified by the lack of decisional law interpreting the discovery provision of section 800." (p. 345.) In any event defendant has failed to show that there was no evidence in the record to support the jury's implied finding that the theft was not discovered more than three years prior to the return of the indictment.

The judgment is affirmed.

NOT FOR PUBLICATION

ALLPORT, J.

We concur:

COBEY, Acting P. J.

POTTER, J.